(1)

Supreme Court, U.S.
FILED

99 23 JUN 22 1999

NO._____

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

WAYNE C. LA VELLE,
Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD,
STATE OF CALIFORNIA,

TRANS WORLD AIRLINES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT, SO76634

WAYNE C. LA VELLE

Pro se Petitioner
1326-F Alewa Drive
Honolulu, Hawaii 96817-1200
808-595-8210

5788

QUESTIONS PRESENTED

1. Did the California Supreme Court error in refusing to review whether the California Workers' Compensation Appeals Board erred and acted without or in excess of its powers, in failing to apply the proper standard of proof for a finding that applicant's termination did not constitute a violation of Labor Code Section 132 (a) without consideration of accommodation.

2. Did the California Supreme Court error in refusing to review whether the California Workers' Compensation Appeals Board erred, and acted without, or in excess of its powers, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution in precluding the applicant from bringing a Labor Section 132 (a) claim because employee received Social Security benefits under 42 U.S.C.A. Section 223 (d) (2) (A).

3. Did the California Supreme Court error in refusing to review whether the Worker's Compensation Appeals Board erred and acted without or in excess of its powers, violated the Fundamental Fairness doctrine, and equal protection clause of the United States Constitution, in striking applicant's treating physician's testimony from the record of proceeding, despite the factual findings that doctor's medical report supported applicant's disability requirements for Leave of Absence with Trans World Airlines.

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NO._____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

WAYNE C. LA VELLE,
Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD,
STATE OF CALIFORNIA,

TRANS WORLD AIRLINES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Wayne C. La Velle, respectfully petitions to review the denial order of the Supreme Court of the State of California.

OPINIONS BELOW

The denial order for petition for review of the Supreme Court, No. 507663, (App. A; A1) stems from a minute order of denial for writ of review; Court of Appeals of the State of California, Second Appellate District Division Seven, (App. B; A2) which stems from the opinion and order denying petition for reconsideration before the Workers' Compensation Appeals Board State of California (App. C; A4); the Workers' Compensation Judge's Report and Recommendation For Reconsideration (App. D; A4), and Workers' Compensation Judge's Opinion On Decision: WCAB. No. LAO 392-377 (App. E; A13), the findings and order denying Labor Code Section 132(a) claim, by the Workers' Compensation Judge in case No. LAO 329377, et al., (App. F; A17). The California Supreme Court denied review on March 24, 1999 (App. A; A1).

JURISDICTION

The California Supreme Court entered its order on March 24, 1999. The jurisdiction of this court is invoked under 28 U.S.C. section 1257(a).

STATUATORY AND CONSTITUTIONAL PROVISION INVOLVED

Section 223(d)(2)(A) of the Social Security Act, as amended, 42 U.S.C.A. section 423 (d)(2)(A) pertinent provision are set forth at (App. I;A24) of the appendix to this petition. Section 1, of the Fourteenth Amendment to the United States Constitution, "the Due Process" section provides protection against violation of the Fundamental Fairness Doctrine and equal protection under the law.

STATEMENT OF THE CASE

This is an action arising from the California Worker's Compensation Act and Labor Code section 132(a), (App J: A24) intended for the protection of workers who are discriminated against because of their injuries, whereby their right to work has been, unfairly, taken away.

In this case, the petitioner sought review of the decision of the Worker's Compensation appeals Board (from now on known as Board) denying his petition for reconsideration. This decision left in effect the ruling of the Workers' Compensation Judge (from now on known as WCJ) that the petitioner's claim under California Labor Code section 132 (a) is premature and precluded because applicant was found to have been collecting Social Security disability benefits.

The Board denied a petition for reconsideration based upon its review of the record and for the reasons stated in said report of the WJC (App. D: A8). Moreover, the Board said, " . . . .it is the applicant's pursuit and receipt of continuing Social Security benefits which support the finding that he was unable to work during the periods when he received such benefits (App. C: A4)."

From the Board's order denying reconsideration, the applicant petitioned the Court of Appeals, State of California for a writ of review. Petitioner restated his claim that the Board violated the Fundamental Fairness doctrine under the Fourteenth Amendment to the Constitution of the United States and his right to due process. The petitioner restated the different standards in measuring disability in worker's compensation cases and awards from the Social Security Administration for disability benefits per 42 U.S.C.A. 223(d)(2)(A); (App. I: A24).

On February 18, 1999, the Court of Appeals, State of California, Second Appellate District, Division Seven let stand the Board's decision denying reconsideration and failed to rule on the federal questions (App. B: A2).

Petitioner then filed for review before the California Supreme Court, where again the claim of constitutional violations were raised concerning the Board's abuse of discretion.

On March 24, 1999, the California Supreme Court summarily denied petition for review and failing to rule on the constitutional issues. The California Supreme Court's denial of petition for review, which is the State Court of the Last Resort, has decided an important federal question in a way that conflicts with the decision of a United States Court of Appeals; *Swanks v. Wmata*, 116 F. 3d 582 (D.C. Cir. 1997).

The California Supreme Court's refusal to review petitioner's federal question of how the Worker's Compensation Appeals Board (from now on known as WCAB) in applying applicants receipts of Social Security disability benefits per 42 U.S.A. 223 (d)(2)(A) (App. I: A24) the principles of *Jordan v WCAB* (1985) 175 Cal. App. 3d. 162 (App. L: A32) has taken away the only remedy under the law for the aggrieved employee/applicant.

California Labor Code section 132(a) states in pertinent parts, " It is the declared policy of this state that there should be no discrimination against workers who are injured in the course and scope of their employment." Any employer who discharges or in any manner discriminates against any employee who has filed a claim for compensation is guilty of a misdemeanor. (Full text of California Labor Code section 132(a) is in Appendix J on page A27 of this petition.)

The WCJ's Finding and Order has omitted and misstated evidence which is fundamental in the applicant's specific request for job accommodation after sustaining injury when the contents of an aircraft chemical toilet fell upon him.

The applicant's pre-trial brief, which gave a complete detailed statement of injury followed by his request for light job duty, was presented at the WCAE hearing on April 8, 1996. The applicant gave more testimony on Sept. 25, 1996 and Feb. 26, 1998, at which time the applicant, once again, repeated his request for either temporary limited duty or medical leave of absence from TWA.

Point Number Four (4) of the Findings of Fact cannot be supported by evidence in the record. The WCJ states that the applicant was terminated for failure to produce either a medical release or medical certification of his medical condition and reason for disability, as per requested by the Collective Bargaining Agreement (from now on known as CBA).

In fact, the applicant's testimony at the trial prove that the applicant presented a cover letter (App. G: A20) dated August 9, 1977, which requested accommodation for light duty and/or leave of absence. This cover letter was presented to TWA Los Angeles medical department. The court records, also, show that medical reports were, appropriately, submitted.

One of the attached medical reports was a psychiatric diagnosis and prognosis from Dr. Marvin P. Eisenberg, M.D. dated August 5, 1977.

The TWA discharge letter of August 15, 1977 recognized receipt of the physical medical report, but failed to state acceptance of Dr. Eisenberg's psychiatrist report. (App. H: A22).

Moreover, the WCJ misinterpreted the CBA's requirements for a medical leave of absence. The CBA, under Article 13 (b)(1) Leave of Absence says in pertinent parts: "Upon proper application accompanied by a physician's statement employee's requests for medical leave extensions (emphasis) shall be granted. In no case will extension be granted so as to cause the medical leave to exceed (5) years." The report of Dr. Eisenberg indicated a period of two years of disability and treatment.

The CBA does not state any specific content of the physician's statement for medical leave. The WCJ's report stated the record has no proof of applicant's ability to return to work.

Applicant's trial Exhibit No.16, which is Dr. Pappas' letter to TWA's medical department, dated Feb. 2, 1977 (App. N: A43); specifically stated that La Velle could return to work with no restrictions after 30 days. This was not a comprehensive medical report, only a physician's statement as per CBA.

Dr. Pappas' statement of an additional 30 days of disability was presented with La Velle's request for medical leave. The approved medical leave was never granted. The interim period between Dec. 16, 1976, when La Velle's leave was to expire to March 8, 1977, was at issue.

Nearly 90 days after, the employer sent notice that applicant was to return to full duty, without the normal CBA requirements. The applicant was treated differently. TWA's letter dated December 30, 1976, demanded La Velle to supply a doctor statement with a medical diagnosis and prognosis. He did so on January 6, 1977 and, again, on February 2, 1977. Yet, TWA failed to grant medical leave.

On or about March 11, 1977, TWA discharged La Velle because of his industrial injury. Then, at the discharge hearing on April 27, 1977, La Velle was reinstated, but not to medical

leave status, as he was previously on. Instead, La Velle was given a conditional re-employment status, which required full duty without accommodations.

TWA's medical department cleared La Velle to return to full duty despite the restrictions set by Dr. Pappas. Mr. La Velle was, once again, prevented from being re-employed in violation of the previously stated LAX Station Order 6.03.

Thus, began the cycle of having the applicant in search of medical leave, instead of employment with accommodations. The petitioner appealed the WCAB Order denying reconsideration to the California Supreme Court. On March 24, 1999, the California Supreme Court denied a review without comment.

REASONS FOR GRANTING THIS PETITION

There is a square conflict between the U.S. courts of Appeal and the California Supreme Court regarding the questions presented. That conflict is starkly illuminated by the contrast between the District of Columbia Circuit's recent decision in *Swanks v. WMATA*, 116 F 3d 582 (D.C. Cir. 1997) and the decision below.

Moreover, the central issue presented by La Velle's claim was whether he could have preformed the essential duties of his job with reasonable accommodation. Instead of resolving the issue, the (WCJ) judge and the WCAB concluded that because La Velle sought and obtained Social Security disability benefits, he could not maintain a discrimination claim under California Labor Section 132(a). The WCAB's conclusion seems to rest on the misunderstanding of Social /Security disability determinations; in assessing eligibility benefits, the Social Security Administration

gives no consideration to a claimant's ability to work with reasonable accommodations.

The petitioner states the reasons for granting this petition are clearly stated in the *Swanks* case cited herein, and are far better than any personal presentation. Therefore, the following excerpts and comments are presented:

This sharply different treatment of similarly situated litigants creates an intolerable conflict and severe unfairness that this court should resolve. The issue is whether an employee can perform the essential duties of his job with reasonable accommodations. Instead of resolving the issue, the magistrate judge in *Swanks v WMATA*, (Supra) and the WCJ in WCAB case below, concluded that because the employee sought and obtained Social Security disability benefits, they could not maintain claims of discrimination within the American with Disability Act (hereafter known as ADA), and the California Worker's Compensation Act.

The *Swanks* decision states the conclusion rest on the misunderstanding of Social Security disability determination; in assessing eligibility for disability benefits, the Social Security Administration gives no consideration to claimant's ability to work with reasonable accommodation.

Furthermore, the *Swanks* court 116 F.3rd 582, (D.C. Cir 1997) said, "The Social Security Administration has established a five-step process to evaluate whether a claimant is disabled. Nowhere in this five-step process does the Social Security Administration take account of the possible effect of reasonable, accommodation on a claimant's ability work.

The fact that an individual may be able to return to a past relevant job, provided that the employer makes accommodations, is not relevant . . .. A Finding of ability to do past relevant work

is only appropriate if the claimant retains the capacity to perform either the actual functional demands and job duties of the particular past relevant job . . . or the functional demands on job duties of the occupation as generally required . . . throughout the national economy.

Whether or how an employer might be willing to alter job duties to suit the limitations of a specific individual would not be relevant.

The contrary view that Social Security disability benefits preclude ADA relief - or as in the present case from the Worker's Compensation Act of California relief – would force disabled individuals into an untenable choice between receiving immediate subsistence benefits under the Social Security Act or pursuing discrimination remedies.

Thus, the claimants choosing benefits must sacrifice an opportunity for reinstatement while simultaneously shielding their employers from liability for allegedly unlawful discrimination. Individuals choosing instead to seek ADA, or agency relief would, by doing so, forgoing their entitlement to Social Security disability benefits. Nothing in either statute requires disabled individuals to make this choice.

In holding that the receipt of disability benefits does not preclude subsequent ADA relief the D.C. Circuit Court of Appeals joined three other circuit courts making similar decisions:

1. *Robinson v. Neodata Servs. Inc.* 94 F.3d 499, 502 n.2 (8th Cir.1996)
2. *Kennedy v. Applause, Inc.* 90 F.3d 1477, 1480-82 (9th Cir.1996)
3. *D'Aprile v. Fleet Servs. Corp.* 92 F.3d 1, 3-5 (1st. Cir.1996)

The *Swanks* case 116 F. 3.d 582 (D.C. Cir. 1997) has a stare decisis effect up on the petitioner's case now before the U.S. Supreme Court on the issue of preclusion.

Because this raises an important question regarding the effect of Social Security disability determinations on ADA, claims and claims of discriminations on Worker's Compensation Acts in all 50 states, there is nothing to prevent state courts from barring employers from asserting preclusion as a legal defense to discrimination.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WAYNE C. LA VELLE
Pre se Petitioner
1326-f-Alewa Drive
Honolulu, Hawaii 96817-1200
(808) 595-8210

APPENDIX

APPENDIX A

Second Appellate District, Division Seven, No. B127805
S076634

IN THE SUPREME COURT OF CALIFORNIA

WAYNE C. LA VELLE

Respondent

SUPREME COURT
FILED

MARCH 24, 1999

v.

Robert Wandraff, Clerk
Deputy

WORKERS' COMPENSATION APPEALS BOARD,
Respondent

TRANS WORLD AIRLINES, *Respondent*

Petition for review DENIED.

GEORGE

Chief Justice

A2

APPENDIX

APPENDIX B

DIVISION 7

February 8, 1999

WAYNE C. LA VELLE

vs.

W.C.A.B.
TRANS WORLD AIRLINES

B127805

Los Angeles County No. LAO 392377
<Unknown County> No. LAO 371256
<Unknown County> No. LAO 380935
<Unknown County> No. LAO 380936
<Unknown County> No. LAO 387156
<Unknown County> No. LAO 392422
<Unknown County> No. LAO 394945
<Unknown County> No. LAO 403651
<Unknown County> No. LAO 391394
<Unknown County> No. LAO 370927
<Unknown County> No. ING 38740
<Unknown County> No. OAK 96517

THE COURT;

The petition for writ of review is denied.

APPENDIX

APPENDIX C

WORKERS' COMPENSATION APPEALS BOARD
State Of California

	Case No. LAO 392377
WAYNE LA VELLE	LAO 370927
	LAO 371256
Applicant,	LAO 380934
	LAO 380935
vs.	LAO 380936
	LAO 387156
	LAO 392422
TRANS WORLD AIRLINES	LAO 394945
	LAO 403651
LIBERTY MUTUAL	LAO 391394
INSURANCE COMPANY	OAK 96517
	ING 38740
Defendant (s).	

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant, Wayne C. La Velle, seeks reconsideration of the Findings and Order issued by a workers' compensation

Administrative law judge (WCJ) on July 31, 1998, in which the WCJ found that defendant did not discriminate against applicant in violation of Labor Code Section 132a. The WCJ found that applicant has not been able to return to work since July 13, 1976, and remains disabled at this time, and that applicant was properly terminated after failing to submit medical certification of his continuing disability.

Initially, we note that the petition for reconsideration was Timely filed. Applicant is a resident of Hawaii, and, as such, He is entitled to an extension of 10 days to file the petition. (Code Civ. Proc. Section 1013.) Contrary to the WCJ's assertion in the report on the petition for reconsideration, it is the applicant's residence, and not that of his attorney, which determines the applicable extension of time for filing.

We turn to consideration of the merits of the petition for Reconsideration. We have considered the allegations of the Petition for Reconsideration, the answer to it, and the contents Of the WCJ's report on reconsideration. On the basis of our Review of the record, and for the reasons stated at pages three To five of the WCJ's report, which reasons we adopt and incorporate, we affirm the WCJ's decision and will deny the petition for reconsideration.

With regard to applicant's request to file a supplemental Petition for reconsideration, we note that applicant claims that he has newly discovered evidence in the form of Social Security records which show that he was able to work in 1979. At page 4 of Applicant's Supplemental Petition for Reconsideration, he admits to having previously stipulated to a continuous period of temporary disability which includes the dates reflected in the dates reflected in the Social Security records which applicant

now wishes to submit. Furthermore, applicant's Social Security benefits for the 1979 periods were restored by a determination in May 1980, after applicant had appealed the termination of such benefits.

It is applicant's pursuit and receipt of continuing Social Security benefits which support the finding that he was unable to work during the periods when he received such benefits. The terminated benefits were later restored. (Defendant's Exhibit D.) The record supports the finding that applicant was Continuously disabled for the entire period found. Under these Circumstances, we decline to admit the additional Social Security Records into evidence or to approve applicant's request to file a supplemental petition for reconsideration. (Cal. Code Regs., tit. 8, section 10848.)

For the foregoing reasons,

IT IS ORDERED THAT APPLICANT'S Petition for Reconsideration, filed August 28, 1998, be, and it hereby is, DENIED.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Colleen S. Casey

I CONCUR,

WORKER'S COMPENSATION
* APPEALS BOARD SEAL*

/s/ Arlene N. Health

/s/ J Wiegand

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 27, 1998

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES
AS SHOWN ON THE OFFICIAL ADDRESS RECORD,
EXCEPT LIEN CLAIMANTS.

vpd /s/ C Lage

APPENDIX

APPENDIX D

CASE NUMBER LAO 392-377(MF) et al

WAYNE C. LaVELLE vs. TRANS WORLD AIRLINES
LIBERTY MUTUAL INS. CO.,

WORKERS' COMPENSATION
JUDGE: HON. YOSH YAMANAKA

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Applicant, Petitioner herein, alleges that the Workers' Compensation Judge erred in finding that the Employer had not violated Labor Code section 132a in 1977. He had previously claimed injuries to his right knee, hands, lungs, back and psyche on eleven specific dates from August 4, 1970 through July 13, 1976 while working as a Fleet Service Helper for the Employer. An earlier permanent disability and out-of-pocket costs, as well as a few "take nothings." The unresolved issue of future medical treatment for the cases in chief was finally resolved in 1994 by way of Compromise and Release.

Petitioner's claim of violation of Labor Code section 132a for discriminatory acts which ultimately resulted in his

termination on August 15, 1977 was heard in multiple days of trial. Petitioner and his representative formally withdrew the claim for lost wages and "work benefits." Thus, the remaining remedies under 132a involve reinstatement, a 50% increase in compensation not to exceed $10,000 and costs and expenses not to exceed $250.

The parties stipulated that Petitioner has been receiving Social Security disability benefits during the period July 14, 1976 through February 24, 1998 and continuing. They saw no reason why the award of Social Security disability benefits will change in the future.

The Workers' Compensation Judge found that Petitioner had been properly terminated after failing to submit medical certification of his continuing disability. Furthermore, it was found that the claim under Labor Code section 132a was premature, as there is no medical evidence of an ability to return to work. Petitioner filed for reconsideration therefrom.

II

DISCUSSION

THE PETITION SHOULD BE DISMISSED AS UNTIMELY

Labor Code section 5903 requires that petitions for reconsideration be filed within twenty (20) days after service of the order contested. An additional five (5) days are allowed if the order is served by mail, pursuant to *Code of Civ. Proc.* Section 1013 and Cal. Code of Regs., tit. 8, section 10507. In the instant case, the Findings and Order was served on July 31, 1998. Thus, Petitioner had twenty- five days, or until August 25, 1998, in which to file his petition. As the initial petition was not filed

until August 28, 1998, the petition was untimely, so should be dismissed.

Petitioner alleges that, as an out-of-state party, he is entitled to ten days for mailing, until August 30, 1998, in which to timely file his petition. *Code of Civ. Proc.* Section 1013. However, although he admits that his attorney of record Hearing Representative "Morton withdraw [sic] his services from the applicant [on August 20, 1998]." However, the substitution of attorneys, as required by *Code of Civil Procedure* sections 284, 285, and 286 has never been filed. Thus, Petitioner was not entitled to ten days for mailing, and his filing on the 28th day should be dismissed as untimely.

AS PETITIONER WAS TERMINATED FOR CAUSE, THERE WAS NO DISCRIMINATION PER LABOR CODE SECTION 132a

On March 9, 1977 and April 28, 1977, Petitioner was offered reemployment after being disabled from work from April 1, 1976 through December 16, 1976. At the time, there was collective bargaining agreement ("CBA") which controlled the terms of medical leaves of absence. Article 13 of the CBA required "proper application and approval of the Company" during each 90-day period. Petitioner was to produce either a medical release or a medical certification of his medical condition, reason for disability and the period of disability. Petitioner was given notice of termination after failing to provide the required medical certification.

He responded by filing a grievance, which was heard on May 18, 1977, and again on June 10, 1977. After the June 10, 1977 hearing, Petitioner was allowed an additional sixty (60) days to provide the required medical documentation, but he failed to do

so. Although the union had represented him through grievance Step 3, the union decided that it would not represent Applicant in a grievance to the fourth and final step. His termination became final per his employer's letter of August 15, 1977.

Based upon these facts and the controlling terms of the CBA, it is clear that Petitioner was terminated for cause, when he failed to submit medical certification for continuing disability. Thus, the termination did not constitute a violation of Labor Code section 132a.

IT IS PREMATURE TO CLAIM DISCRIMINATION UNDER LABOR CODE SECTION 132a BECAUSE PETITIONER HAS NEVER SHOWN THAT HE IS READY TO WORK

Even if there were no good cause supporting the August 15, 1977 termination, the present claim would be precluded pursuant to *Jordan v. WCAB* (1985) 175 C.A.3d 162, 50 CCC 688. There, the Court of Appeal held that, where an injured worker is unable to return to work, it is premature for that worker to file a claim under Labor Code section 132a. Here, it is undisputed that Petitioner has been collecting Social Security disability benefits continuously since July 14, 1976. He has been off work ever since April 1, 1976 and there is no substantial medical evidence of his ability to return to work. For instance, his treating psychiatrist, Dr. Marvin Einstein, reported on August 5, 1977, that "this patient can be rehabilitated, probably should not go back to work for TWA, and will continue to require psychotherapy and maintenance on Lithium Carbonate. He will need to be seen at least once per week for at least one year, probably not more than 3 years." More recently, treating Orthopedist Robert Hunt's office advised that Applicant had been temporary total disability from at least as early as December,

1986 through October, 1994. Nor are there any return to work slips after October, 1994. As Petitioner has never been able to return to work since April 1, 1976, his claim under Labor Code section 132a is premature, per *Jordan, id.*

III

RECOMMENDATION

As the petition was not timely filed, it should be DISMISSED.

/s/ YOSH YAMANAKA
WORKERS' COMPENSATION
JUDGE

SERVED BY MAIL ON
PARTIES LISTED BELOW
ON: 9/24/98

BY: /s/ DELIA MORALES

Wayne LaVelle, P.O. Box 1111, Honolulu, HI 96807-1111
Zonni, Ginocchio & Taylor, 516 Burchett St., Glendale,CA 91203
Ralph Morton, 1028 N. Lake Ave., #101 Pasadena, CA 91104
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Stockwell, Anderson, et al., P.O. Box 48917, LA, CA 90048

APPENDIX E

CASE NO. LAO 392377 (MF) (1); 371256 92; 392422 (3); 380934 (4); 380935 (5); 380936; 391394 (7); 387156 (8); 394945 (9); 403651 (10); 370927 (11); ING 38740 (12); OAK 96516 (13)

WAYNE C. LA VELLE	*vs.*	TRANS WORLD AIRLINES
DATES OF INJURIES		VARIOUS
WCAB REFEREE;		HON. YOSH YAMANAKA

OPINION ON DECISION

BACKGROUND:

Applicant claimed injuries to his right knee, hands, lungs, back and psyche on eleven specific dates from August 4, 1970 through July 13, 1976 while working for the airlines. Trial resulted in a number of awards of temporary disability, permanent disability and out-of pocket costs, as well as a few "take Nothings." The unresolved issue of future medical treatment for the cases in chief was finally resolved in 1994 by way of Compromise and Release.

However, Applicant has further claimed violation of

Labor Code section 132a for discriminatory acts which ultimately resulted in his termination on August 15, 1977. After multiple days of trial, Applicant and his representative formally withdrew the claim for lost wages and "work benefits." Thus, the remaining remedies under 132a involve reinstatement, a 50% increase in compensation not to exceed $10,000 and costs and expenses not to exceed $250.

The parties stipulated that Applicant has been receiving Social Security disability benefits during the period July 14, 1976 through February 24, 1998 and continuing. They see no reason why the award of Social Security disability benefits will change in the future.

DISCRIMINATION PER LABOR CODE SEC. 132a:

On March 3, 1977, and April 28, 1977, Applicant was offered reemployment after being disabled from work for an extended period of time since July 14, 1976. At the time, there was a collective bargaining agreement ("CBA") which controlled the terms of medical leaves of absence. The CBA required him to produce within each 90-day period, either a medical release or a medical certification of his medical condition, reason for disability and the period of disability. Applicant failed to provide the required medical certification so was given notice of termination.

He responded by filing a grievance, which was heard on May 18, 1977, and again on June 10, 1977. After the June 6, 1977 hearing, Applicant was allowed sixty (60) additional days to provide the required medical documentation, but he failed to do so. Although the union had represented him through Level Three grievance, the union decided that it would not

represent Applicant in a grievance to the fourth and final level. his termination became final per his employer's letter of August 15, 1977.

Based on these facts and the controlling terms of the CBA, it is found that Applicant was terminated for cause, when he failed to submit medical certification of continuing disability. Thus, the termination did not constitute a violation of Labor Code Section 132a.

LACK OF RIPENESS PURSUANT TO JORDAN:

In *Jordan v. WCAB* (1985) 175 C.A.3d 162, 50 CCC 688, The Court of Appeal held that, where an injured worker is unable to return to work, it is premature for that worker to file a Claim under Labor Code Section 132a. Here, it is undisputed That Applicant has been collecting Social Security disability benefits continuously since July 14, 1976. There is no substantial medical evidence of applicants ability to return to work following July 13, 1976. More recently, treating Orthopedist Robert Hunt's office advised that Applicant had been TTD from least as early as December, 1986 through October, 1994. furthermore, there were no return to work slips after October, 1994. Thus, it is found that Applicant has never been able to return to work since July 13, 1976, so his claim under Labor Code Section 132a is premature, per *Jordan, id.*

EFFECT OF THE STAY IN BANKRUPTCY:

As it is found that there was no act of discrimination, the issue of preclusion of remedies by the stay in bankruptcy is moot.

Dated: /s/ **YOSH YAMANAKA**
Workers' Compensation Referee

Served by: Workers' Compensation Appeals Board
Date: /s/Jose L. Liore 7/31/98

APPENDIX

APPENDIX F

WORKERS COMPENSATION APPEALS BOARD
State Of California

WAYNE LA VELLE *Applicant;*	Case Nos: LAO 3932377 (MF); 370925; 371256; 380935; 380936; 380943; 387156; 391394; 392422; 392422; 394945; 403651; ING 38740; OAK 96517
vs.	**FINDINGS & ORDER**
TRANS WORLD AIRLINES LIBERTY MUTUAL INSURANCE COMPANY *Defendant*	

LAW OFFICE OF WILLIAM J. BROWN III
By Ralph W. Morton, Hearing Representative
Attorneys for Applicant

ZONNI, GINOCCHIO & TAYLOR
By: Larry Fields
Attorneys for Defendants

Applications having been filed herein; all parties having and having been regularly submitted, the Honorable YOSH YAMANAKA, Workers' Compensation Judge, finds and orders as follows.

FINDINGS OF FACT

1, WAYNE LA VELLE, born January 15, 1946, while employed as a ramp service man/fleet service at Los Angeles, California by TWA claimed to have sustained injuries to his right knee, hand, lungs, back and psyche on eleven specific dates from August 4, 1970 through July 13, 1976. Trial resulted in a number of awards of temporary disability, permanent disability and out-of-pocket costs, as well as few "take nothings." The unresolved issue of future medical treatment for the cases in chief was finally resolved in 1994 by way of Compromise and Release.

2, Applicant has further claimed violation of Labor Code Section 132a for discriminatory acts which ultimately resulted in his termination on August 15, 1997.

3. The parties stipulated that applicant has been receiving Social Security disability benefits during the period July 14, 1976 through February 25, 1998 and continuing. They see continuing. They see no reason why the award of Social Security disability benefits will change in the future.

4. Applicant was terminated for failure to produce either a medical release or a medical certification of his medical condition, reason for disability and the period of disability as required of disability as required by the collective bargaining agreement.

The termination did **not** constitute a violation of Labor Code Section 132a.

5. As it is found that applicant has never been able to return to work since July 13, 1976, his claim under Labor Code Section 132a is premature, per *Jordan, v. WCAB.*

6. It is found that there was no act of discrimination, the issue of preclusion of remedies by the stay in bankruptcy is moot.

.

ORDER

IT IS ORDERED that applicant takes nothing by this filing

Filed and Served by mail on:
On all parties on the
Official Address Record
By /s/ Jose L. Liore
7/31/98

/s/ Yosh Yamanaka
Workers Compensation Judge

APPENDIX

APPENDIX G

August 9, 1977

Dr. J. Brath
Chief Medical Services
Trans World Airlines

Dear Dr. Brath:

In a letter dated June 22, 1977, Mr. E. D. Kaufman ordered a comprehensive diagnosis and prognosis of my medical condition.

In order to comply with specifically what Mr. Kaufman has stated in his letter of June 22, 1977, an extension must be requested as to procure further medical reports [and] to assist you in arriving to a fair decision, in determining whether a job requiring light duty or an extension to of a leave of absence is needed.

I am now under the care of Dr. Bruce P. Hector, of the Bruce Medical Group. I'm in the middle of having x-rays and testing to determine what [is] physically wrong with me. Therefore, at this time I wish to submit a report from Marvin Eisenberg, M.D.

In reference to the back injury the following reports are submitted:
Paul H. Goodley, M.D., Edward LeMoncheck, M.D., and Vasilios S. Lambros, M.D.

In reference to the knee injury a report from Dr. Stanley Josephs M.D. [is being submitted.]

As requested in Mr.Kaufman's letter dated June 22, 1977, Dr. Bruce P. Hector has estimated from thirty to forty-five fays will be needed to gather hospital x-rays, reports, and discharge evaluations, in order to give an accurate narrative summary of my medical problems.

It is to that to which this letter is concerned.

Thank you,
/s/ Wayne LaVelle

cc: E.D. Kaufman
A. M. – F. T. C.
SEMON J. Shabbie – Attorney at Law

APPENDIX

APPENDIX H

TWA
1543 SHATTO STREET, LOS ANGELES,
CALIFORNIA U.S.A. 90017 483-1600

August 15, 1977

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Wayne C. La Velle
C/o Semon J. Shabkie – Attorney at Law
California Federal Building – Suite 630
1910 Sunset Boulevard
Los Angeles, California 90026

Reference: My letter of June 22, 1977

Dear Mr. La Velle:

After a thorough review by the TWA Medical Department of the documents you presented on August 10, 1977 to justify an extension to your medical leave of absence, it has been determined that those documents have nothing to do with your current state of medical health. The most current statement that you presented to substantiate your request was

dated April of 1977, some two months prior to the date on which you requested an additional 60 days to obtain current medical statements regarding your present medical health. Mr. LaVelle, it is apparent to me that you have not fulfilled the terms outlined in my June 22, 19777 letter to you and your actions over the past 60-day extension indicate that you do not intend to do so. To afford you yet another delay of 30 to 45 days, as you now request would serve no worthwhile purpose.

It is therefore my decision that your services with TWA be terminated as of December 16, 1976, the expiration date of your most current leave of absence.

Accordingly, you must return all items of TWA property in your possession including your identification badge, pass allotment card and any uniform items you may still possess.

Sincerely,

/s/ E. D. Kaufman

CC: Mr. Wayne C. La Velle
200 38th Street
Manhattan Beach, CA 90266
IAM Committee
C. L. Golzio
J. H. Williams

APPENDIX

APPENDIX I

42 U. S. C. A. 423 (d); (1)(A); (2)(A); (2)(B); (5)(B)

(d) "Disability" defined

(1) The term "disability" means—

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or

(2) For purposes of paragraph (1)(A)—

(A) An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

(B) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

(5)(B) In making any determination with respect to whether an individual is under a disability or continues to be under a disability the Secretary shall consider all evidence available in such individual's case record, and shall develop a complete medical history of at least the preceding twelve months for any case in which a determination is made that the individual is not under a disability. In making any determination the Secretary shall make every reasonable effort to obtain from the individual's treating physician (or other treating health care provider) all medical evidence, including diagnostic tests, necessary in order to properly make such determination, prior to evaluating medical evidence obtained from another source on consultative basis.

APPENDIX

APPENDIX J

Workmen's Compensation
Revision Of Labor Code Section 132a

Workmen's Compensation: employer discrimination

Labor Code section 132a (repealed); 132a (new);
Section 4553 (amended).
SB 1157 (Marks); STATS 1972, Ch 874
SB 1133 (Marks); STATS 1972, Ch 1029
Support: California Teamsters Legislative Council;
Federated Firefighters of California
Opposition: California Conference of Employers
Association; East Bay Municipal Utility District

Chapter 874 repeals section 132a of the Labor Code and adds a new section 132a to declare that it is the policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment

An employer is guilty of a misdemeanor and is subject to the provisions of Labor Code section 4553 *infra* if he discharge, or in any manner discriminates against any employee because the employee has done any of the following:

(1) filed or made known his intention to file an application with the Workmen's Compensation Appeals Board;
(2) received a rating, award or settlement; or
(3) testified or made known his intention to testify in a matter relating to the appeals board.

Similarly, any insurance carrier who advises or directs an insured (employer) under penalty of cancellation or a raise in premium or any other threat, to discharge an employee because that employee has filed or made known his intention to file an application with the appeals board, or because the employee has received a rating, award or settlement, is guilty of a misdemeanor and is subject to the provisions of section 4553.

Labor Code section 4553, as amended by Chapter 129, provides that the amount of compensation otherwise recoverable by an injured employee shall be increased on half where the employee is injured by reason of the serious and willful misconduct of the employer; however, such increases in award shall in no event exceed $10,000 (rather than $7,500 as the section previously provided). Proceedings under section 132a for increased compensation as provided in section 4553 are to be instituted by filing an appropriate petition with the appeals board, which is vested with full power, authority and jurisdiction to make a final determination of all matters specified in section 132a, subject only to judicial review. However, such proceeding may not be commenced more than one year from the discriminatory act or date of termination of the employee.

APPENDIX

APPENDIX K

THE VALLEY PSYCHIATRIC MEDICAL CLINIC

3959 Laurel Canyon Boulevard, Suite H, Studio City, CA 91604 (213) 980-7311 984-0814

August 5, 1977

Connecticut General Life Insurance Company

TO WHOM IT MAY CONCERN

RE: La Velle, Wayne

As requested, a psychiatric evaluation was performed on Wayne La Velle, a 31 year old caucasian male who was first seen in this clinic on September 14, 1976. He was followed in treatment by Mr. John May, who is currently associated with the Valley Psychiatric Medical Clinic. I saw Mr. La Velle on Septemer 15, 1976 for consultation with John May.

The patient stated that while maintaining a plane on July 12, 1976, the chemical toilet contents fell on him, and he has not been able to work since that time. He suffered from recurrent nightmares, nausea, diaphoresis, and morbid associations, i.e. when he noticed someone pouring honey it reminded him of the honey bucket and "he broke out into profuse sweat, and flashed on the accident". He also complains that the injury to his knees markedly interfered with his sex life, whereas formerly he could satisfy his wife's requirements. I

have reviewed the multitudeness medical, orthopedic, neurological, and psychiatric reports in the file, and have had the opportunity to treat Mr. La Velle consistently over almost the past year. I have also had the opportunity to treat his father, who is a Manic-depressive disorder which is controlled and maintain on Lithium Carbonate.

Psychometric tests were also performed by Martin E. Mendel, Chief Clinical Psychologist which were consistent with Clinical findings. The battery of psychological tests included were: Intellectual assessment, personality tests, and projective techniques. Plannings were that he has average intellectual endowment, and that he is functioning at approximately normal intellectual range, tending toward the bright average end of the scale. He has a good fund of information, has average variable and reflects a good deal of inner anxiety, his ability to grasp both verbal and non-verbal intellectual problems is good, and he demonstrates good visual motor coordination. There is no evidence for psychotic ideation.

The tests were also consistent with a basically cyclothymic personality makeup with pronounced manic and depressive mood swings. The overall personality picture is that of an emotionally labile individual with considerable feelings of insecurity and preoccupation with his on emotional weakness. He appears to be a somewhat dependent individual who attempts to deal with his passive dependent tendencies by passive-aggressive attitudes and interpersonal relationships. His capacity for interpersonal relationships is characterized by much interpersonal conflict with his family and with others. There is a particularly serious problem in regard to relationships with authority figures which appears to tie in with a somewhat chaotic and harsh early upbringing.

The patient has considerable awareness of his emotional problems, and has been seeking periodic psychiatric help.

At present there is also extensive preoccupation with his Somatic dysfunctioning with much preoccupation over his inability to function physically because of his back, his hand, his knee, etc... He feels generally disabled because of these physical impairments. The other component that emerges at this time is extensive profound resentment at the mistreatment he feels he has received at the hands of TWA, and the union, and he appears incessantly and painfully preoccupied with his need to have a fair settlement. At this time he projects much of his chronic frustration feelings of pain, feelings of failure, onto these frustrating situations. Simultaneously , he is aware of having continued personal problems and is attempting to handle these in psychotherapy. The need for Lithium therapy management has been recognized before by several psychiatrists.

Diagnostically the test picture is consistent with a person with a manic-depressive disposition, considerable emotional lability, and mood swings, for which he has sought psychiatric help in the past. The current severe level of aggressions, the current level of severe distress appears on the basis of the tests to have been exacerbated by his physical impairment and preoccupation with it. The impairment evidently growing out of several work related accidents; it appears exacerbated as well by stresses brought about by his work conflicts and his feeling profoundly discriminated against by the employer. His need to obtain a fair settlement appears to be seen as Mr. La Velle's way of indicating himself in his own eyes, and in the eyes of others and to recapture sense of self worth. In summary, that tests are consistent with a chronic character logic emotional disorder which has been exacerbated by work related emotional and pysical trauma.

This is a log of my findings over this period of time and the interpretations: Mr. La Velle did have some psychiatric disturbances prior to the accident. He has a family history of manic-depressive syndrome and clinically manifests marked liability, hypomania, preoccupation with sex, and certain paranoid features. The patient did not respond well to Lithium Carbonate in the past because he did take it consistently.

In the past few months, with psychotherapy and consistent ingestion of the Lithium Carbonate the patient has achieved far more stability and consistent powers of concentration, more coherence, and less rambling. In fact he has demonstrated ability to pursue a relentless consistent performance in review of his legal case. He manifests no psychotic behavior at present. Manic-depressive syndrome being controlled by the Lithium Carbonate and psychotherapy. However, he displays definite severe symptoms related to the accident superimposed on any re-existent condition, independent of it, and apparently as a result of the emotional trauma after the incident when the feces fell upon him. He still complains of impotence and premature ejaculation. He is also very sensitive to certain odors of chemical fumes.

I believe this patient can be rehabilitated, probably should not go back to work for TWA, and will continue to require psychotherapy and maintenance on Lithium Carbonate. He will need to be seen at least once per week for at least 1 year, probably not more than 2 years. I hope this information is helpful to you.

Sincerely,
/s/ Marvin P. Eisenberg, M.D.

MPE/cp

APPENDIX

APPENDIX L

December 2, 1985

Verna D. Jordan, Petitioner v. Workers' Compensation Appeals and General Telephone Company, Respondents.

W.C.A.B. No, 83 MON 056813

Civil No. B010325-Court of Appeal, Second Appeals District, Division 2

[175 Cal. App. 3d 162, 220 Cal. Rptr. 554]

Discrimination-An employer's termination of an industrially injured employee after three leaves of absence over a period of 18 months was not unreasonable where the employee was still not physically able to perform her regular job at the end of the 18-month period. [See generally Hanna, Cal. Law Emp. Inj. And Workmen's Comp., Vol. 2, section 17.08[2].]

Proceeding to review a decision of the Workers' Compensation Appeals Board holding that an employer had not violated the provisions of Labor Code section 132a. Decision *affirmed.*

For petitioner-Drasin, Sparagna, Polan, Kessler & McNulty, by Lawrence Drasin

For amicus curiae California Applicants' Attorneys On behalf of petitioner-Merle C. Rabine

For respondent employer-Maier & Rogers, by William J. Rogers

For respondent Appeals Board-Richard W. Younkin , William B. Donohoe, Alvin R. Barrett, by Alvin R. Barrett

Verna Dea Jordan (petitioner) alleging that her employer General Telephone co., Inc. (respondent) had discriminated against her in violation of Labor Code section 132a[1] petitioned the Workers' Compensation Appeals Board (Board) for the various forms of relief therein provided. The Board found that respondent employer had not violated section 132a. We agree.

We initially denied the petition for review. Subsequently the Supreme Court transferred the matter to this court with instructions to issue the writ of review and calendar the matter before the court. Our attention was directed to a number of cases, the principal and controlling one being *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658 [43 Cal. Comp. Cases 1205, 150 Cal. Rptr. 250, 586 P.2d 572]. We have dutifully complied and have determined that our original denial was correct and that the Board's decision was proper.

Our review of the decision of the Board is, of course, confined to a determination of whether, under the relevant

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1 Labor Code section 132a provides in part: "(1) Any employer who discharges, or threatens to discharge, or in any manner discriminates against

law, the decision is supported by substantial evidence. (*Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (*supra*); *LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal. 3d 627 [35 Cal. Comp. Cases 16, 83 Cal. Rptr. 208, 463 P.2d 432].)

On January 16, 1982, applicant sustained orthopedic and Psychiatric injury arising out of and in the course of her employment as a telephone directory assistance operator. She continued working intermittently until September 2, 1982, after having exhausted her sick leave and vacation credits, she requested and received from General a six month leave of absence. In March 1983, she requested and was granted a second leave of absence through September 17, 1983; and in August 1983 she requested and received a third leave of absence through March 17, 1984. In February 1984, petitioner received an award for temporary total disability.

When she requested a fourth leave of absence in that same

---

any employee because he or she has filed or made known his or her intention to file an application for adjudication with the appeals board, or because the employee has received a rating, award or settlement, is guilty of a misdemeanor and the employment compensation shall be increased by one-half, but in no event more than ten thousand dollars (10,00), together with costs and expenses not in excess of two hundred and fifty dollars ($250). Any such employee shall also be entitled to reimbursement and reimbursement for lost wages and work benefits caused by the act of the employer.:

All further section references herein shall be to the Labor Code unless Otherwise indicated.

month, respondent advised her by letter that pursuant to article XXIV[2] of the collective bargaining agreement governing her position, she was not entitled to a further leave of absence and unless she returned to work by March 17, 1984, she would be terminated. When petitioner did not return to work, her employment was terminated effective March 17, 1984, 18 months after her last day of work.

In the meantime petitioner, on March 12, 1984, five days earlier had filed her application for benefits pursuant to section 132a. At this writing petitioner has not applied for rehire or recall.

Mr. Greenhow, respondent's Labor Relations Manager, testified that there is no distinction between industrial and non-industrial medical leaves of absence; after exhaustion of vacation and sick leave credits medical leaves of absence may be granted for six months and extended for two additional six

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2 Article XXIV of the collective bargaining agreement between General and the Communications Workers of America at the time in question provided in part as follows:

> "...1.2 Regular Employees will be granted a leave of absence without pay, service requirements permitting, for a period up to six calendar months....1.3 An employee who has been granted a leave of absence and is unable to return to work at the end of the leave of absence may have an additional leave of absence not to exceed six months. 1.4 If the employee is unable to return to work due to illness at the end of the second leave of absence period, a third leave of absence not to exceed six months will be granted upon certification by the Company Medical Director."

month periods, for a total of eighteen months; and if the employee is unable to return to work after eighteen months' leave of absence, the employment is terminated and the terminated employee has no right to rehire. Applicant's termination was handled the same way as any other termination where medical leave of absence had expired; and Mr. Greenhow knows of no exception to this termination policy in the 14 years he has served with General.

Mr. Greenhow also testified that although an employee terminated pursuant to the 18-month leave of absence rule has no right to rehire, such employee is eligible for rehire if a position for which the employee is qualified becomes open; terminated employees who have been off work for work related medical problems, and both categories of employees having an advantage over the general public.

He further testified that on rehire an employee's seniority is computed on the aggregate amount of time worked both before and after any break in service. This would be true even in the case of an employee on leave of absence, i.e., the period of absence would be deducted from length of service .

In *Judson, supra,* the employee after less than a year's employment sustained an industrial injury. Shortly thereafter he applied for workers' compensation benefits. Slightly over a year he returned to work. Subsequent to his return he was laid off because of a lack of available work.

According to a provision in the collective bargaining agreement, the employee's continued absence in excess of 12 months resulted in loss of seniority. That provision, however, was subject to extension of the 12 month period by mutual agreement between the union and the employer.

In *Judson* there was no extension and there was evidence that had the employee retained his seniority as it existed at time of injury, he would have survived the lay off when the availability of work declined after his return to work.

The Supreme Court in reaching its conclusion that the employee's layoff was a violation of section 132a, stressed the requirement of giving deference to the decision of the Board.

There the Board's decision, which was approved by the court, was that section 132a prohibited employers from wrongfully penalizing an employee in any way,''...solely because he was injured on the job or had to lose time from work solely because of a work injury (*rather than for example, situations in which the employer reasonably believes that the employee's injury prevents him from being able to do his job in an appropriate manner*)....'''(*Judson, supra,* 22 Cal. 3d at pp. 6667; emphasis added.)

Thus it was held that, under the circumstances, the loss of seniority was an unlawful penalty which violated section 132a. The court explained, and we think that this is the key to an understanding of *Judson,* that the employee was, despite his injury, *competent to perform his job and that his former job was upon his return.*

The court clearly stated on page 667''...our present holding in no way mandates that an employer retain all employees who sustain injuries on the job...Section 132a does not compel an employer to ignore the realities of doing business by 'reemploying' unqualified employees or employees for whom positions are no longer available." (Fn. Omitted.)

Turning now to the case at bench it is our opinion that petitioner's attempt to invoke section 132a as interpreted in *Judson* is simply premature. It is undisputed that petitioner has received all of the usual benefits attendant to a temporary total disability. It is further undisputed that petitioner is not presently competent to perform her regular job and view of the length of time for which she has been unable to perform her regular job it is not reasonably possible to predict when, if ever, she will be able to return.

If and when petitioner regains the ability to perform her regular job and seeks reinstatement, respondent's conduct at that time can be tested against section 132a and the precepts of *Judson.*

It is neither realistic nor reasonable to require that an employer create a class of absentee employees, outside the ambit of the collective bargaining agreement, by keeping positions "open" for an indefinite period of time on the possibility that their former occupants may recover from an industrial injury.

Here the collective bargaining agreement appears to have been more than reasonable in providing for 18 months absence over and above vacation and sick time to cover "temporary" physical disability and illness.

In summary, there was substantial evidence to support the Board's decision that in terminating petitioner's employee status, under these circumstances, respondent did not violate section 132a.

The decision is affirmed.

Compton, J.

I concur:

Roth, P.J.

Gates, J., concurring:

I find the present case disquieting. Whether due to inability or mere unwillingness, neither party has attempted to offer any pragmatic explanation for its actions. J.R. Greenhow, respondent's Labor Relations Manager "testified that if the applicant had not [been] terminated *there would have been no hardship to the company, only inconsistency.*" (Emphasis added.) One is therefore left to wonder why a company employing some 26,000 workers and "approximately 1,000 to 1,100 directory assistance operators, the majority of whom in Southern California" would deem it necessary or appropriate to place in economic limbo those injured in its service merely to attain paper symmetry.

Appellant, in her turn, has failed to point to any loss she presently has suffered, or will necessarily suffer, by her reason of her "termination." In fact, she did not dispute Greenhow's testimony that "the company does not have to recall those who were terminated for exceeding leave of absence privileges, *but no one who has vere applied for recall has been denied.*" (Emphasis added.)

In sum, apparently the parties have neither achieved nor forfeited anything of practical value or consequence to date. Furthermore, of course, how one chooses to characterize any possible future transformation of this appellant, who is presently incapacitated and receiving disability payments, to her former role of productive and salaried worker, appears to be no more than exercise in preferential semantics. The court in *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal. 3d 658, at page 667 [43 Cal. Comp. Cases 1205, 150 Cal. Rptr. 250, 586 P.2d 572], utilized such terms as "*re*instatement" and "*ree*mploying" (emphasis added) when treating with the plight of an injured employee who had been *permanently* discharged despite his full recovery.

Rare, indeed, should be the case where one party is rewarded and another punished by reason of some hypothetical future event that may or may not ever come to pass. Consequently, I join my colleagues in concluding that until such time as appellant is able to demonstrate she has sustained not err declining to require to pay her a $10,00 penalty.

Gates, J.

APPENDIX

APPENDIX M

APPLICABLE CONTRACT PROVISIONS

ARTICLE XII

System Board of Adjustment

(a) In compliance with Section 204, Title II, of the Railway Labor Act, as amended, there is hereby established a System Board of Adjustment for the purpose of adjusting and deciding disputes or grievances which may arise under the terms of the Agreement and which are properly submitted to it after exhausting the procedure for settling disputes, as set forth under Article XI.

****

LAX Maintenance Department, Station Order 6.03, dated November 30, 1960

Subject: Employees on Limited Duty

Industrial

When an employee is injured on the job and limited duty is necessary, the /Company designated attending physician must always make the decision. The Foreman or Supervisor should then be encouraged to find a job for which the man can be used, thereby giving the Company some benefit of his services, increasing his chances of recovery through occupational therapy and saving the man's sick pay continuance for a later time when he might have greater need for it.

APPENDIX

APPENDIX N

References to documents written by Dr. Basil Pappas, M.D.

1. On January 6, 1977 Dr. Basil Pappas of Central Medical Center located at 214 N. Central Avenue in Glendale, CA, wrote the following note:

   " Working in or around chemical fumes would be detrimental to the lungs of this patient in their present weakened state. /s/ Basil Pappas, M.D."

2. On February 2, 1977, Dr. Basil Pappas wrote the following letter:

   " At present, Mr. LaVelle is being treated for gastroenteritis (nervous stomach). I am not aware of the need for a medical leave of absence. You will note that my note makes no mention of same. I do realize that the necessary medications do cause a degree of drowsiness. That must be the reason Mr. LaVelle has asked for a rest period. In which case 1 month should suffice. A period of care away from al strong fumes is customary after a heavy viral infection. After which there should be no restrictions. Should Mr. LaVelle then continue to complaint of pulmonary problems, he will then be referred to a specialist. His bowels are another situation; these conditions can clear completely in a short time or become chronic re-occurrences, it is up to the individual.

Supreme Court, U.S.
FILED
SEP 7 1999
OFFICE OF THE CLERK

(2)

No. 99-23

IN THE SUPREME COURT OF THE UNITED STATES

WAYNE C. LA VELLE,
Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD,
STATE OF CALIFORNIA,
Respondent,

TRANS WORLD AIRLINES,
Real Party in Interest.

SUPPLEMENTAL BRIEF TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

WAYNE C. LA VELLE
Pro se Petitioner
1326-F Alewa Drive
Honolulu, Hawaii 96817-1200
808-595-8210

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I. INTRODUCTION

Petitioner submits this supplemental brief to bring to the court's attention a recently rendered opinion by this court in Cleveland v. Policy Management Systems Corp. et al., No. 97-1008, 526 U.S. ___ (1999) (hereinafter "Cleveland"), decided May 24, 1999, which was not available to the Petitioner at the time he filed his Petition For Writ of Certiorari.

The Supreme Court of the United States has made a decision in Cleveland that directly impacts the case of LaVelle v. Workers' Compensation Appeals Board (TWA) (1998), which the Supreme Court of California refused to review and which is now before this court.

Cleveland was a disabled person who, after suffering a stroke and losing her job, sought and obtained Social Security Disability Income (SSDI) benefits from the Social Security Administration (SSA). She also sued her former employer under the Americans with Disabilities Act of 1990 (ADA), claiming that she was discriminated against when her employer fired her after she had requested job accommodations.

The Federal District Court did not evaluate Cleveland's reasonable accommodation claim on the merits. Instead the Court granted summary judgement to the defendant employer because it believed Cleveland's application for and receipt of SSDI benefits proved she was totally disabled from performing her job. The District Court concluded that because she was totally disabled, she was estopped from proving an essential element of her ADA claim: namely, that she could perform the essential functions of her job with at least reasonable accommodation.

The United States Supreme Court held in Cleveland that the pursuit and receipt of SSDI benefits does not automatically estop a recipient from pursuing an ADA claim, nor does it erect a

strong presumption against the recipient's success on an ADA claim. To survive her claim, however, Cleveland can not ignore her SSDI contention that she was too disabled to work. She must be ready to explain why her SSDI contention is consistent with her ADA claim that she can perform the essential functions of her job with at least reasonable accommodation.

Like Cleveland, Wayne LaVelle sought and obtained SSDI benefits from the SSA after suffering a disabling industrial injury. Like Cleveland, LaVelle was fired from his job after requesting job accommodation. Like Cleveland, LaVelle was estopped by a court from proving an essential element of his discrimination claim that he could perform the essential functions of his job with at least reasonable accommodation. But unlike Cleveland, who had filed her discrimination claim under the ADA, LaVelle filed his discrimination claim under the California Labor Code Section (CLCS) 132(a), alleging that his former employer, Trans World Airlines (TWA), discriminated against him by discharging him instead of providing him, as he had requested, with light duty job accommodation pending resolution of his injury.

II. THE CHRONOLOGY OF EVENTS IN LA VELLE'S CLAIMS UNDER THE SOCIAL SECURITY ACT AND THE CALIFORNIA LABOR CODE.

LaVelle's SSDI benefits claim and his CLCS 132(a) claim developed in the following way:

> *July 12, 1976*: LaVelle sustained an industrial injury to his psyche and internal organs at TWA. While he was servicing a plane, its chemical toilet contents fell on him.
>
> *October 6, 1976*: LaVelle filed an application for SSDI benefits.

October 20, 1976: LaVelle's medical condition improved. He attempted to return to work with the accommodation that he not work around chemicals as recommended by his physician, but TWA refused to make any accommodation (See Exh. #1 Lodge, p. L1).

December 13 & 14, 1976: The Workers' Compensation Appeals Board (WCAB) disability trial started, and LaVelle testified to the industrial injuries he had sustained.

December 22, 1976: SSA denied LaVelle's application for SSDI benefits.

December 23, 1976: LaVelle asked SSA to reconsider its 12/22/76 SSDI benefits denial. He said the TWA doctor would not let him return to work.

January 6, 1977: LaVelle's treating physician, internist Dr. Pappas, said petitioner could return to duty with accommodations (See Pet. Wrt. Cert., App. N, p. A42).

March 8, 1977: LaVelle returned to work with a medical request for light duty. TWA refused to accommodate him (See Exh. #2 Lodge, p. L7).

March 11, 1977: TWA discharged LaVelle and removed him from the seniority list (See Exh. #3 Lodge, p. L10).

April 29, 1977: TWA rescinded its discharge of LaVelle and restored him to the seniority list (See Exh. #4 Lodge, p. L12 and Exh. #5 Lodge, p. L14). His treating physician cleared him medically for light duty (See Exh. #6 Lodge, p.

L16), but TWA refused to accommodate him (See Exh. #5 Lodge, p. L14).

May 18, 1977: The first TWA investigational hearing was held pursuant to the Collective Bargaining Agreement (CBA) Article IV (a)(19) to determine whether LaVelle could perform his regular job without accommodation.

May 31, 1977: The WCAB disability trial last held on December 14, 1976 resumed.

June 10, 1977: The TWA investigational hearing last held on May 18, 1977 resumed and then ended.

August 9, 1977: LaVelle requested from TWA light duty and provided TWA with medical reports supporting his disability (See Pet. Wrt. Cert., App. G, p. A20).

August 15, 1977: TWA fired LaVelle (See Pet. Wrt. Cert., App. H, p. A22).

August 29, 1977: LaVelle filed a CLCS 132(a) claim contending TWA discriminated against him by terminating his employment instead of placing him on light duty pending the resolution of his injuries.

December 5 & 19, 1977: The WCAB disability trial last held on May 31, 1977 resumed.

January 9, 1978: The SSA awarded SSDI benefits to LaVelle retroactive to 7/14/76, which was the first day LaVelle was unable to return to work following his last industrial injury with TWA on 7/12/76. In awarding LaVelle SSDI benefits, the SSA administrative law judge credited the

testimony of Dr. Eisenberg given on 1/4/78 (See Exh. #7, Lodge, p. L18) and the medical report of Dr. Eisenberg dated 8/5/77 (See Pet. Wrt. Cert., App. K, p. A28 – A31), which had been submitted by LaVelle to TWA on 8/9/77 before his termination (See Pet. Wrt. Cert., App. G, p. A20).

July 17, 1978: The WCAB disability trial last held on December 19, 1977 resumed.

July 21, 1978: The WCAB disability trial ended.

April 8, 1996: The trial on LaVelle's CLCS 132(a) claim began.

September 25, 1996: LaVelle testified at trial on his CLCS 132(a) claim that on October 20, 1976 he had requested of TWA light duty such as picking up papers in the parking lot, but TWA had refused his request (See Exh. #8 Lodge, p. L23).

February 26, 1998: The trial on LaVelle's CLCS 132(a) claim ended.

July 31, 1998: The WCAB judge (hereinafter "Workers' Compensation Judge" or "WCJ") rendered his Findings and Order that TWA's termination of LaVelle did not constitute a violation of CLCS 132(a) (See Pet. Wrt. Cert., App. F, p. A17 – A19).

August 28, 1998: LaVelle filed a petition for reconsideration of the WCJ's Findings and Order dated July 31, 1998.

October 27, 1998: The WCAB issued its opinion and order denying LaVelle's petition for reconsideration (See Pet. Wrt. Cert., App. C, p. A4 – A7).

February 8, 1999: The California Court of Appeals in LaVelle v. WCAB (TWA) (1998) (hereinafter "LaVelle") denied LaVelle's petition for writ of review of the WCAB's opinion and order denying his petition for reconsideration (See Exh. #9 Lodge, p. L26).

March 24, 1999: The Supreme Court of California denied LaVelle's petition for review of the Court of Appeals denial of his petition for writ of review of the WCAB's opinion and order denying his petition for reconsideration (See Pet. Writ. Cert., App. A, p. A1).

III. THE CONFLICT BETWEEN CLEVELAND AND LA VELLE IN LIGHT OF BARNS

In its October 27, 1998 opinion and order denying LaVelle's petition for reconsideration, which the California Court of Appeals and the Supreme Court of California later refused to review, the California Workers' Compensation Appeals Board (WCAB) held:

> It is applicant's pursuit and receipt of continuing Social Security Benefits which support the finding that he was unable to work during the periods when he received such benefits. (Pet. Wrt. Cert., App. C, p. A6).

The above holding of the Board in LaVelle squarely conflicts with the decision of this court in Cleveland. In Barns v. Workers' Compensation Appeals Board, 266 Cal. Rptr. 503, 508 (Cal. App. 1 Dist. 1989) (hereinafter "Barns") (See Exh #10 Lodge, p. L28), the California Court of Appeals held that an instance of discrimination under a CLCS 132(a) claim occurs when an employer refuses to place an injured worker on light duty "pending the resolution of his

injury", absent a showing by the employer of any business necessity warranting its refusal to make the accommodation. As stated earlier in the above chronology of events in the development of his SSDI benefits claim and his CLCS 132(a) claim, LaVelle requested light duty, but the employer, TWA, refused his request. At no time in the record did TWA attempt to meet its statutory burden of justifying its refusal to make the accommodation on the basis of business necessity.

Finally, LaVelle showed he qualified under Barns to request light duty as he had not yet completely recovered from his injury. In other words, he requested light duty pursuant to Barns at a period of time when the resolution of his injury was pending (See Pet. Wrt. Cert., App. K, p. A28 – A31 at p. A31 where LaVelle's physician, Dr. Eisenberg, stated in his medical report dated August 5, 1977 that the patient is improving, can be rehabilitated, and requires further treatment for at least one but no more than two years. See also Pet. Wrt. Cert., App. G, p. A20 where LaVelle stated in his August 9, 1977 letter to TWA that he is submitting a copy of Dr. Eisenberg's report to TWA with his August 9th letter, which was subsequently received by TWA prior to its termination of his employment of August 15th).

IV. THE MISAPPLICATION OF JORDAN TO LA VELLE IN LIGHT OF CLEVELAND AND BARNS

In its October 27, 1998 opinion and order denying LaVelle's petition for reconsideration, which the California Court of Appeals and the Supreme Court of California later refused to review, the WCAB stated it agreed with the WCJ's report that LaVelle's CLCS 132(a) discrimination claim was premature under Jordan v. Workers' Compensation Appeals Board, 220 Cal. Rptr. 554 (Cal. App. 2 Dist. 1985) (hereinafter "Jordan"). In Jordan, the injured employee did not seek job accommodation, but rather sought an extension to her medical leave of absence for a period of time exceeding that which was allowed under the collective bargaining agreement (CBA). After her employer terminated her once she had

exhausted her maximum leave of absence permitted under the CBA, she brought a CLCS 132(a) claim against the employer. The California Court of Appeals ruled her claim was premature holding:

> If and when petitioner regains the ability to perform her regular job and seeks reinstatement, respondent's conduct at that time can be tested against section 132(a) and the precepts of *Judson*. (Emphasis added) (Jordan, 220 Cal. Rptr. at 556 or Pet. Wrt. Cert., App. L at p. A38).

In the case of LaVelle, however, he like Cleveland but unlike Jordan had requested and was subsequently denied job accommodation or light duty pending the resolution of his injury (see above-mentioned chronology of events). In light of the earlier described case of Barns (1989) – which mandates an employer to provide a period of light duty accommodation to a returning employee, absent any business necessity that would prevent an employer from doing so – the WCAB wrongly applied Jordan (1985) to LaVelle in 1998 by requiring him to be able to return to his regular job without restrictions before he could bring a CLCS 132(a) claim for a subsequent termination of employment.

Notwithstanding the above, Jordan supports LaVelle where it holds:

> It is neither realistic nor reasonable to require that an employer create a class of absentee employees, outside the ambit of the collective bargaining agreement, by keeping positions "open" for an indefinite period of time on the possibility that their former occupants may recover from an industrial injury (Emphasis added). *Id.*

LaVelle, unlike Jordan, was within the ambit of the CBA at the time of his discharge. Pursuant to Article 13 (b) (1) of the TWA-IAM CBA, medical leaves of absence could total up to five years (See Exh. #11 Lodge, p. L40 and Pet. Wrt. Cert., p.6). At the time of his discharge, LaVelle had used only one year of medical

leave from August 1976 to August 1977. Additionally, within the ambit of the CBA, LAX Maintenance Department Station Order 6.03 provided an injured employee with the option of limited work duty (See Pet. Wrt. Cert., App. M, p. A41). This option of limited work duty as provided by the station order has been addressed by a decision of the TWA-IAM System Board of Adjustment in the grievance of Marshall Story, whose factual situation was similar to that of LaVelle (See Exh. #12 Lodge , p. L 44).

IV. CONCLUSION

The holding in LaVelle by the California Workers' Compensation Appeals Board, which the California Court of Appeals and the Supreme Court of California refused to review, conflicts with the decision of this court in Cleveland. Cleveland and LaVelle both sought and obtained SSDI benefits from the SSA after each suffered a disabling injury. They were both eventually fired after their employers refused their requests for job accommodation. Thereafter, the courts estopped both of them from proving an essential element of their respective discrimination claims: namely, that each could perform the essential functions of his or her job with reasonable accommodation.

In light of this court's recent decision in Cleveland, the application and receipt of SSDI benefits no longer precludes an SSDI recipient from later making a claim of discrimination for wrongful termination of employment. The WCAB decision in LaVelle, however, requires disabled injured workers in California who are later discharged to make an untenable choice between either applying for immediate subsistence benefits under SSA or pursuing a discrimination claim under the California Labor Code. Consequently, under LaVelle if a disabled injured worker in California chooses to apply for SSDI benefits, he or she must forego an opportunity to be reinstated to a job with accommodation. The net effect of this choice by the worker, then, shields the employer from liability for alleged unlawful discrimination at the

expense of increased SSDI payments by the Federal Government to the disabled injured worker.

Given this court's recent decision in Cleveland and its impact upon LaVelle as explained herein, it is now more appropriate than ever that the petition for writ of certiorari filed by Wayne C. LaVelle be granted.

Respectfully submitted,

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